ROBERT MAKEMSON, et al., Petitioners, v. MARTIN COUNTY, Respondent. Supreme Court of Florida. Case No. 66,780. July 17, 1986. Application for Review of the Decision of the District Court of Appeal—Certified Great Public Importance. Robert Makemson, in proper person, Stuart, Florida; and Robert G. Udell, in proper person, Stuart, Florida, for Petitioners. Michael H. Olenick, County Attorney, Stuart, Florida, for Respondent. Michael Zelman, Miami, Florida, for Florida Criminal Defense Attorneys Association and National Legal Aid and Defender Association, Amicus Curiae. Robert A. Ginsburg, Dade County Attorney, and Eric K. Gressman, Assistant County Attorney, Miami, Florida, for Metropolitan Dade County, Amicus Curiae.

(ADKINS, J.) In *Martin County v. Makemson*, 464 So.2d 1281 (Fla. 4th DCA 1985), the Fourth District quashed the trial court's order declaring unconstitutional section 925.036, Florida Statutes (1981), and allowing petitioners to be compensated for their representation of an indigent criminal defendant in amounts exceeding the statutory maximum fees. The district court, while upholding the statute's validity, noted that "an absolute fee cap works an inequity in some cases," 464 So.2d at 1283, and certified to this Court four questions as being of great public importance. We have jurisdiction, article V, section 3(b)(4), Florida Constitution, and find the fee maximums unconstitutional when applied to cases involving extraordinary circumstances and unusual representation.

Prior to setting out the certified questions, we turn to the factual predicate on which they were based. Petitioner Robert Makemson, a resident of Martin County, was appointed by the court pursuant to section 925.036 to represent one of four defendants. The representation

spanned a nine-month period, as each defendant had been charged with first-degree murder, kidnapping and armed robbery. Because the victim of the crime was a member of a prominent local family, the entire resources of the prosecutor were brought to bear on the case. Three prosecutors and two special investigators sat at the counsel table, and over one hundred witnesses and fifty depositions were involved in the trial.

After the four cases were severed, each defendant sought and ultimately obtained a change of venue. Petitioner therefore spent his sixty-four hours in court on the case at the Lake County courthouse, some one hundred and fifty miles from his home. Upon completion of the representation, petitioner asked for compensation for the total 248.3 hours spent on the case in an amount based upon a calculation using an hourly rate established by the chief judge of the circuit. While expert testimony established the value of his services at a minimum of $25,000, he asked for and obtained $9,500. Six thousand dollars has been placed in escrow pending disposition of this appeal, as the statute would allow only $3,500 as compensation for the representation. §925.036(2)(d), Fla. Stat. (1985).

The trial court additionally found it necessary to accept petitioner Robert Udell's low bid of $4,500 as compensation for the representation of the defendant upon appeal although the statute would allow only $2,000. §925.036(2)(e), Fla. Stat. (1985). The court also set the funds aside prior to the representation, in spite of the statute's terms providing for payment "at the conclusion of the representation." §925.036(1), Fla. Stat. (1985).

The trial court expressed the dilemma it faced:

> [T]his court is confronted with conflicting laws, one of which requires competent counsel for a defendant who has been sentenced to death and the other stating that defense counsel can be paid only $2,000 for his services. The lowest bid for these services was $4,500, which is more than twice what the Legislature has allowed. One of these laws must yield to the other. There is no doubt in the court's mind that the Legislature, if confronted with the problem, would admit that the law requiring competent counsel was paramount and superior to the law allowing a mere $2,000 fee for the dreadful responsibility involved in trying to save a man from electrocution. Therefore this court finds that F.S. 925.036 in setting rigid maximum fees without regard to the circumstances in each case is arbitary and capricious and violates the due process clause of the United States and Florida Constitutions. See *Aldana v. Holub*, 381 So.2d 231 (Fla. 1980). In simpler language, the Statute is impractical and won't work.

The trial court additionally found the statute unconstitutional as an impermissible legislative intrusion upon an inherent judicial function. Art. V, §2; art. III, §2, Fla. Const. The statute then in force, identical to the present statute, provided as follows:

> (1) An attorney appointed pursuant to s. 925.035 or s. 27.53 shall, at the conclusion of the representation, be compensated at an

hourly rate fixed by the chief judge or senior judge of the circuit in an amount not to exceed the prevailing hourly rate for similar representation rendered in the circuit; however, such compensation shall not exceed the maximum fee limits established by this section. In addition, such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the court. If the attorney is representing a defendant charged with more than one offense in the same case, the attorney shall be compensated at the rate provided for the most serious offense for which he represented the defendant. This section does not allow stacking of the fee limits established by this section.

(2) The compensation for representation shall not exceed the following:

(a) For misdemeanors and juveniles represented at the trial level: $1,000.

(b) For noncapital, nonlife felonies, represented at the trial level: $2,500.

(c) For life felonies represented at the trial level: $3,000.

(d) For capital cases represented at the trial level: $3,500.

(e) For representation on appeal: $2,000.

§ 925.036, Fla. Stat. (1981).

§ 925.036, Fla. Stat. (1981).

The Fourth District quashed the trial court's declaration of unconstitutionality and certified to this Court the following four questions:

> I. [Is the statute] unconstitutional on its face as an interference with the inherent authority of the court to enter such orders as are necessary to carry out its constitutional authority?
>
> II. If the answer to the first question is negative, could the statute be held unconstitutional as applied to exceptional circumstances or does the trial court have the inherent authority, in the alternative, to award a greater fee for trial and appeal than the statutory maximum in the extraordinary case?
>
> III. If the answer to the second question is affirmative, should the trial court have awarded an attorney's fee above the statutory maximum for proceedings at the trial level, given the facts presented to it by trial counsel by his petition and testimony?
>
> IV. If the answer to the second question is affirmative, should the trial court have awarded an attorney's fee above the statutory maximum for proceedings at the appellate level before the services were rendered and with the facts known to it at the time of the award?

464 So.2d at 1283-86.

We answer the first question in the negative and the remaining questions in the affirmative. While we cannot find the statute facially unconstitutional, as it is ordinarily well within the legislature's province to appropriate funds for public purposes and resolve questions of compensation, article III, section 12, Florida Constitution; *State ex rel. Caldwell v. Lee*, 27 So.2d 84 (Fla. 1946); *State v. Ruiz*, 269 Ark. 331, 602 S.W. 2d 625 (1980), we find that the statutory maximum fees, as inflexibly imposed in cases involving unusual or extraordinary circumstances, interfere with the defendant's sixth amendment right "to have the assistance of counsel for his defence." The statute, as applied to many of today's cases, provides for only token compensation. The availability of effective counsel is therefore called into question in those cases when it is needed most.

Although facially valid, we find the statute unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused. At that point, the statute loses its usefulness as a guide to trial judges in calculating compensation and becomes an oppressive limitation. As so interpreted, therefore, the statute impermissibly encroaches upon a sensitive area of judicial concern, and therefore, violates article V, section 1, and article II, section 3 of the Florida Constitution. As eloquently expressed by Indiana's Supreme Court in *Carlson v. State ex rel. Stodola*, 247 Ind. 631, 633-34, 220 N.E.2d 532, 533-34 (1966):

> The security of human rights and the safety of free institutions require freedom of action on the part of the court . . . Our sense of justice tells us that a court is not free if it is under financial pressure, whether it be from a city council or other legislative body . . . One who controls the purse strings can control how tightly those purse strings are drawn, and the very existence of a dependent.

More fundamentally, however, the provision as so construed interferes with the sixth amendment right to counsel. In interpreting applicable precedent and surveying the questions raised in the case, we must not lose sight of the fact that it is the defendant's right to effective representation rather than the attorney's right to fair compensation which is our focus. We find the two inextricably interlinked.

While in our decision of *Metropolitan Dade County v. Bridges*, 402 So.2d 411 (Fla. 1981), the majority found the statute mandatory rather than directory in its fee limits and constitutional, each member of the Court expressed the conviction that such an interpretation, as applied in certain circumstances, would intrude upon sixth amendment rights. Even the majority noted that:

> Unless it is demonstrated that the maximum amounts designated for representation in criminal cases by section 925.036 are so unreasonably insufficient as to make it impossible for the courts to appoint competent counsel to represent indigent defendants, we cannot say that section 925.036 violates the sixth amendment right to counsel.

402 So.2d at 414-45.

In *Rose v. Palm Beach County*, 361 So.2d 135 (Fla. 1978), we invoked the doctrine of inherent judicial power in order to declare statutory maximums on witness compensation and travel expenses directory rather than mandatory. While noting that the doctrine should be invoked only in situations of clear necessity, we held that "if the statute is deemed to establish an absolute maximum in all situations, then it must be said to improperly infringe the prerogative of the court in effectuating the constitutional right to compulsory process." 361 So.2d at 135.

Having approached the instant question with due caution, we must once again affirm the proposition that "the courts have authority to do things that are absolutely essential to the performance of their judicial functions," *Id.*, for we must find that the sixth amendment's guarantee of effective assistance of counsel at least equals in fundamentality and importance its sister provision setting forth the right of the accused "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. We can do no less than to zealously safeguard each.

We find that the trial court has here met its burden of showing that its action in exceeding the statutory maximums was necessary in order to enable it to perform its essential judicial function of ensuring adequate representation by competent counsel. *Wakulla County v. Davis*, 395 So.2d 540 (Fla. 1981). Thus, we answer the third question certified affirmatively; the facts were sufficiently "extraordinary" to warrant the action taken.

A survey of the repeated attacks on the validity of the statute highlights the strong tension between the counties' treasuries, as protected by the statutory maximum fees, and the attorneys seeking compensation more fair than that the legislature would grant. As previously pointed out, we must focus upon the criminal defendant whose rights are often forgotten in the heat of this bitter dispute. In order to safeguard that individual's rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter. As we noted in *City of Tallahassee v. Public Employees Relations Commission*, 410 So.2d 487, 490 (Fla. 1981), "[t]he unconstitutionality of a statute may not be overlooked or excused for reasons of inconvenience." This ruling may indeed require some financial adjustment in the counties' budgeting process, and the exploration of some alternatives. We note, however, that the counties' fears may be in part misplaced. Petitioners seek only "reasonable," and not "market value" compensation. Token compensation is no longer to be an alternative.

We find that a significant pattern emerges upon examining the case law involving the statute's validity. It has long been the trial courts, most intimately aware of the complexity of the case and the effectiveness of counsel, which have time after time found the statute unconstitutional in order to exceed its guidelines and award a fee more nearly approaching fairness. Until this opinion, these courts have been continually reversed upon appeal. *See, e.g., Wakulla County v. Davis*, 395 So.2d 540 (Fla. 1981); *Broward County v. Wright*, 420 So.2d 401 (Fla. 4th DCA 1982); *Dade County v. Strauss*, 246 So.2d 137 (Fla. 3d DCA 1971), *cert. denied*, 253 So.2d 864 (Fla. 1971), *cert. denied*, 406 U.S. 924 (1972).

We can no longer afford to ignore the message these courts have been attempting to send.

Respondent Martin County refers us to precedent emphasizing the lawyer's common law duty to represent the indigent for no compensation, *In interest of D.B. and D.S.*, 385 So.2d 83 (Fla. 1980); and referring to service at the statutory fee rate as a form of pro bono public service to the poor in criminal proceedings. *Broward County v. Wright.* These cases, in our view, fail to address the true concerns in issue. First, we may not allow the guarantee of effective representation in today's courtrooms to be diluted by reference to the state of affairs at the common law.

Second, even if the statute as presently implemented may be viewed as a form of pro bono service, it is an extremely haphazard and unfairly imposed system in practice. When the United States Supreme Court, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), found fundamental the right to effective counsel and established the state's duty to provide representation to the indigent, it by no means intended to place the weight of this duty upon the shoulders of a few individual practitioners appointed by the court. The system as it presently stands forces these individuals, in the most difficult cases, to bear a burden which is properly the state's with only token compensation for their efforts. As noted in the dissent in *McKenzie v. Hillsborough County*, 288 So.2d 200, 202 (Fla. 1973):

> No citizen can be expected to perform civilian services for the government when to do so is clearly confiscatory of his time, energy and skills, his public service is inadequately

> compensated, and his industry is unrewarded . . . I do not believe that good public conscience approves such shoddy, tawdry treatment of an attorney called upon by the courts to represent an indigent defendant in a capital case.

We simply cannot on the one hand instruct the bench and bar, as we did in *Wilson v. Wainwright*, 474 So.2d 1162, 1165 (Fla. 1985), that "[a] perfunctory appointment of counsel without consideration of counsel's ability to fully, fairly and zealously advocate the defendant's cause is a denial of meaningful representation which will not be tolerated," and at the same time deny the courts the ability to exceed the fee limits when necessary to do justice.

Certain pressing realities facing practitioners in today's courts can no longer be ignored. First, the increasing complexity of some of today's cases calls for the investment of more time and effort in order to effectively represent one's client. These complexities also raise the spectre of later claims of ineffective assistance of counsel, which in certain types of cases may be expected to be eventually raised regardless of any factual basis for the claim. Practicing attorneys are aware how such claims, even if found meritless, may adversely impact upon one's hard-bought professional reputation.

Second, rising costs mut be figured into the equation. While the statute allows for the reimbursement of expenses reasonably incurred, section 925.036(1), Florida Statutes (1985), the statutory fee will in many instances be insufficient to cover even overhead expenses during the proceeding. The legislature's amendments

to the statute in chapter 81-273, Laws of Florida (1981) make clear its compromise addressing the issue of adequate compensation. This amendment deleted the provision allowing "reasonable compensation" in capital cases, section 925.035(1), Florida Statutes (1979), and raised the statutory fee limits. The fee limits presently in force stand too far from fair compensation, as applied to certain cases, to be allowed to stand. The link between compensation and the quality of representation remains too clear. See the dissent in *Mackenzie*, 288 So.2d at 202 ("The adage that 'you get what you pay for' applies not infrequently. In our pecuniary culture the calibre of personal services rendered usually has a corresponding relationship to the compensation provided."); *Gideon v. Wainwright*, 327 U.S. at 344 ("[T]here are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defense.").

Finally, we answer the fourth question certified. Because the trial judge found it necessary to accept a bid exceeding the statutory limit in order to ensure representation upon appeal, he acted within his authority in doing so. Because the statute does, however, provide for compensation "at the conclusion of the representation," we note that in light of this opinion trial courts should not in the future need to determine the compensation to be paid prior to the representation in order to obtain competent counsel.

In summary, we hold that it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the state's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the

accused is not compensated in an amount which is confiscatory of his or her time, energy and talents. More precise delineation, we believe, is not necessary. Trial and apellate judges, well aware of the complexity of a given case and the attorney's effectiveness therein, know best those instances in which justice requires departure from the statutory guidelines. We recede from that portion of *Bridges* which is inconsistent with this opinion, and, in sum, find the statute directory rather than mandatory in nature.

We therefore quash the Fourth District's quashal of the trial court's order granting just compensation for petitioners' services in this case.

It is so ordered. (BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., Concur. McDONALD, C.J., Concurs in result only.)

MARTIN COUNTY, Petitioner,

v.

Robert MAKEMSON, Esquire, and
Robert G. Udell, Esquire,
Respondents.

No. 83-1138.

District Court of Appeal of Florida,
Fourth District.

March 6, 1985.

Court-appointed attorneys sought fees for trial and appeal of a criminal case. The Circuit Court, Martin County, Philip G. Nourse, J., awarded them fees, and county petitioned for writ of common-law certiorari. The District Court of Appeal, Glickstein, J., held that: (1) trial court incorrectly awarded excess fee to court-appointed trial counsel by determining statute which limited attorney's fees to be unconstitutional, and (2) trial court's award of attorney fee to court-appointed appellate counsel had to be quashed, since statute governing attorney's fees provided for award of compensation "at the conclusion of the representation" and the award to appellate counsel was made at the beginning of appeal, not at the conclusion.

Writ granted; award quashed.

Anstead, C.J., filed dissenting opinion.

1. Attorney and Client —132

Trial court incorrectly awarded excess fee to court-appointed trial counsel in criminal case by determining statute which limited attorney's fees to be unconstitutional. West's F.S.A. § 925.036.

2. Attorney and Client —132

Trial court's award of attorney fee to court-appointed appellate counsel in criminal case had to be quashed, since statute governing attorney's fees provided for award of compensation "at the conclusion of the representation" and the award to appellate counsel was made at the beginning of appeal, not at the conclusion. West's F.S.A. § 925.036.

Michael H. Olenick, Stuart, for petitioner.

Robert Makemson of Summers & Makemson, P.A., Stuart, pro se respondent.

Robert G. Udell, Stuart, pro se respondent.

GLICKSTEIN, Judge.

This is a petition for certiorari brought by a county which originally named as respondents the trial judge[1]

[1]We have dismissed the trial judge from this appeal after issuing an order to petitioner to show cause why the trial judge should not be dismissed as a respondent. See our opinion upon the inappropriateness of naming trial judges as respondents in petitions for certiorari directed to the orders they enter, in *Arvida Corporation v. Hewitt*, 416 So.2d 1264 (Fla. 4th DCA 1982).

who awarded attorney's fees to court-appointed attorneys for the trial and appeal, respectively, of a criminal case, and the two attorneys to whom they were awarded. The trial judge, in awarding the fees, declared section 925.036, Florida Statutes (1981),[2] which authorized but limited them, to be a legislative usurpation of an exclusive judicial power, contravening Article V, Section 1 of the Florida Constitution.

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[2]Section 925.036, Florida Statutes (1981) provides:

(1) An attorney appointed pursuant to s. 925.035 or s. 27.53 shall, at the conclusion of the representation, be compensated at an hourly rate fixed by the chief judge or senior judge of the circuit in an amount not to exceed the prevailing hourly rate for similar representation rendered in the circuit; however, such compensation shall not exceed the maximum fee limits established by this section. In addition, such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the court. If the attorney is representing a defendant charged with more than one offense in the same case, the attorney shall be compensated at the rate provided for the most serious offense for which he represented the defendant. This section does not allow stacking of the fee limits established by this section.

(2) The compensation for representation shall not exceed the following:

(a) For misdemeanors and juveniles represented at the trial level: $1,000.

(b) For noncapital nonlife felonies represented at trial level: $2,500.

(c) For life felonies represented at the trial level: $3,000.

(d) For capital cases represented at the trial level: $3,500.

(e) For representation on appeal: $2,000.

The highest court of this state considered attacks upon the pre-1981 version of this statute based upon other Florida constitutional provisions, as well as the United States Constitution, and has repelled them. In *Metropolitan Dade County v. Bridges*, 402 So.2d 411, 414 (Fla.1981), it said:

> Neither the due process nor equal protection clauses are implicated by section 925.036. In *MacKenzie v. Hillsborough County*, 288 So.2d 200 (Fla.1973), we upheld the constitutional validity of section 925.035 which established a maximum of $750 as reasonable compensation to counsel appointed to represent an indigent in a criminal case. This statute was challenged on the basis that it contravened the equal protection and due process clauses of the Constitutions of the United States and of the State of Florida. *Initially, we reiterated that the right to recover attorney's fees as a part of the costs in an action did not exist at common law and that it therefore was provided for by the legislature's enactment of section 925.035.* [emphasis added].

The trial court here disregarded a major caution sign which expressly appears in *Metropolitan Dade County v. Bridges.* Notwithstanding that it was only a plurality decision, three of the justices agreed upon the following:

> We also hold that this section [925.036] is mandatory and not directory and that the trial court erred in construing it by adding the language which would permit the trial court to award fees higher than those specified by statute where the court determined exceptional circumstances to exist.

Id. at 413. Two of the justices dissented in part, expressing their conclusion that the trial court had the power to award a fee in excess of the statutory maximum in extraordinary circumstances. A third justice agreed in essence with these latter two justices by ruling the statute to be directory, not mandatory. The remaining justice concluded that the statute was sufficiently constitutional on its face to repel the specific attacks being made upon it; however, he rejected the exceptional circumstance test being applied to individual cases and concluded it should be determined by a showing relating to lawyers or types of cases as a class.

After *Metropolitan Dade County, Marion County v. DeBoisblanc*, 410 So.2d 951 (Fla. 5th DCA), *pet. for rev. denied*, 419 So.2d 1196 (Fla.1982), expressly rejected the contention upon which the trial court made its judgment in this case. In *DeBoisblanc*, the facts of which were strikingly similar to those of the present case, the fifth district said:

> The issue in this case is whether or not the trial court has an inherent power to award an attorney fee irrespective of any attempted limitation by the state legislature. Section 925.036, Florida Statutes, became effective October 1, 1978. The Florida Supreme Court previously has upheld the constitutionality of a statutory fee limit, which was the predecessor of the 1978 enactment. *MacKenzie v. Hillsborough County*, 288 So.2d 200 (Fla.1973). Recently, the Florida Supreme Court again has upheld the constitutionality of the fee limitation statute against an attack that it violates the equal protection and due process clauses of the Constitutions of the United States and of the State

of Florida. *Metropolitan Dade County v. Bridges*, 402 So.2d 411 (Fla.1981). This court, applying the *MacKenzie* precedent, has upheld the constitutionality of the specific statutory limitation challenged by this appeal. *County of Seminole v. Waddell*, 382 So.2d 357 (Fla. 5th DCA 1980).

In *Waddell* the trial court had not directly passed upon the validity of the statutory limitation, but had held it to be directory rather than mandatory. We reversed on authority of *MacKenzie* and the clear wording of the statute. *See also Pinellas County v. Maas*, 400 So.2d 1028 (Fla. 2d DCA 1981); *Dade County v. Goldstein*, 384 So.2d 183 (Fla. 3d DCA 1980). In the instant situation, the trial court, despite the precedents of *MacKenzie* and *Waddell*, purported to invalidate section 925.036 on the ground that it was "a mandatory usurpation by the legislature of constitutional power vested solely in the judiciary under Article V, Section 1 of the Florida Constitution (1968), which power is removed from the legislature by Article II, Section 3, Florida Constitution (1968) . . . ." This holding by the trial court is in direct conflict with *Bridges* and *MacKenzie* and, therefore, must be reversed.

Id. at 952-53.

Later, this court relied upon *Metropolitan Dade County* to uphold the constitutionality of the 1981 version of the statute and its mandatory nature in *Broward County v. Wright*, 420 So.2d 401 (Fla. 4th DCA 1982).

[1] With such plethora of authority, the trial court was incorrect in awarding an excess fee to trial counsel

by determining the statute to be unconstitutional. Moreover, it ignored another well-known caution sign spotlighted by the *Metropolitan Dade County* Court:

> A legislative enactment is presumed valid and will not be declared unconstitutional unless it is demonstrated beyond a reasonable doubt that the statute conflicts with some designated provision of the constitution. Whenever reasonably possible and consistent with the protection of constitutional rights, courts will construe statutes in such a manner as to avoid conflict with the constitution.

402 So.2d at 413-14. Accordingly, we grant the writ and quash the award to trial counsel.

[2] We do likewise as to the award to appellate counsel, not only because of all of the foregoing decisions but also because of the express language of the statute which provides for the award of compensation "at the conclusion of the representation." Here, the award to appellate counsel was made at the beginning of the appeal, not at the conclusion.

Notwithstanding everything we have said, we feel that an absolute fee cap works an inequity in some cases. We therefore request that the Florida Supreme Court visit the difficult questions which the present case poses, as being of great public importance. Accordingly, we certify the following with the additional thoughts recited herein:

I

We first ask whether section 925.036, Florida Statutes (1983) is unconstitutional on its face as an interference

with the inherent authority of the court to enter such orders as are necessary to carry out its constitutional authority.

Although this is a question of our state constitution, and other states' holdings on this question are not dispositive, we have nevertheless considered the decisions of other states on the subject. In *Smith v. State*, 118 N.H. 764, 394 A.2d 834 (1978), the New Hampshire Supreme Court ruled as did the present trial judge, Justice Grimes speaking for the court:

> We hold that RSA 604-A:5 and Laws 1975 ch. 505, § 1.01(04), (05) are unconstitutional insofar as they shift much of the State's obligation to the legal profession and intrude impermissibly upon an exclusive judicial function.
>
> We are convinced that the profession must be relieved of this burden and that the burden must pass to the citizens of New Hampshire, whose duty it has been since 1966. The members of the bar, being taxpayers, will of course share in it. We also believe, however, that the bar should continue to contribute something more. To accomplish the ends of this decision, court-appointed attorneys should be paid a reasonable fee, but one somewhat less than that which an ordinary fee-paying client would pay.
>
> It remains to be determined just what "reasonable compensation" means and who is to decide the matter in this and future cases. The obligations and responsibilities of the bar are matters of judicial concern alone. *See Schware v. Bd. of Bar*

> *Examiners*, 353 U.S. 232, 248, 77 S.Ct. 752 [761], 1 L.Ed.2d 796 (1957) (Frankfurter, J., concurring); N.H. Judicial Council 5th Report 20-21 (1954); *State v. Rush*, 46 N.J. 399, 411, 217 A.2d 441, 447 (1966); *In re Lacey*, 11 Cal.2d 699, 701, 81 P.2d 935, 936 (1938). Since the obligation to represent indigent defendants is an obligation springing from judicial authority, so too is the determination of reasonable compensation for court-appointed attorneys a matter for judicial determination. The power to regulate officers of the court is a power inherent in the judicial branch. Implicit in that power is the authority to fix reasonable compensation rates for court-appointed attorneys. The legislature recognized this authority in enacting RSA 604-A:4; which provides that "[e]ach court before which the counsel represented the defendant shall fix the compensation and reimbursement to be paid the counsel." Thus, we hold that it is for the trial courts of New Hampshire to fix the amount of compensation due in each case hereinafter provided. The rate awarded by the court should neither unjustly enrich nor, as the present fee schedule does, unduly impoverish the court-appointed attorney.

Id. at 838-39.

We have found no agreement by other states that such statute is facially unconstitutional as a usurpation of the judicial role. In fact, the entire current of the law has been flowing in a direction opposite to that of New Hampshire's highest court. See *Bias v. State*, 568 P.2d 1269, 1271 (Okla. 1977) and cases cited therein.

Finding no guidance there, we look to federal practice. Lawyers were first required for indigent defendants at

trial as a matter of federal constitutional law in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), and in appeals as of right, *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). *Gideon* pronounced the sixth amendment right to counsel a fundamental right made obligatory upon the states by the fourteenth amendment. Justice Douglas, concurring, said:

> rights protected against state invasion by the Due Process clause of the Fourteenth Amendment are not watered down versions of what the Bill of Rights guarantees.

372 U.S. at 347, 83 S.Ct. at 798, 9 L.Ed.2d at 807.

Congress responded to *Gideon* by the enactment in the following year of the Criminal Justice Act of 1964, Pub.L. No. 88-455, 78 Stat. 552, 553 (1964) as amended 18 U.S.L. § 3006A(d)(2) (1976).[3] The appealability, or non-appealability, of attorney fee awards under the federal statute is discussed in *In re Baker*, 693 F.2d 925 (9th Cir.1982), which held it was not appealable and reviewed decisions of other circuits. We note, however, that Congress has recognized the need for a fee increase for attorneys representing indigents in federal courts. Because the fees allowed to these attorneys have failed to cover even their overhead in recent years, attorneys were finding it economically infeasible to accept

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[3]The statute is discussed generally in 9 A.L.R. Fed. 569. Its history can be reviewed in *United States v. Bailey*, 581 F.2d 984 (D.C.Cir.1978); *United States v. Johnson*, 549 F.Supp. 78 (D.C.D.C.1982) and *United States v. Tutino*, 419 F.Supp. 246 (D.C.N.Y. 1976).

representation. This declining participation might have precipitated a representational crisis, but legislators have hopefully forestalled it by doubling the hourly rate permitted to such lawyers.[4]

II

If the answer to the first question is negative, could the statute be held unconstitutional as applied to exceptional circumstances or does the trial court have the inherent authority, in the alternative, to award a greater fee for trial and appeal than the statutory maximum in the extraordinary case?

In *Bridges*, as we have stated earlier in this opinion, the Supreme Court of Florida as it was constituted in 1981 could not agree how to handle the "exceptional circumstance." We have also recognized the admonition that trial and intermediate appellate judges should not have an itchy trigger finger anxious to shoot down statutes by aiming at their constitutionality. Some states have held such statutes to be unconstitutional, however, when applied to "exceptional circumstances"; so this state's highest court would not be alone in so doing. *See Bias v. State*, 568 P.2d 1269 (Okla.1977), which was guided by the reasoning in *People ex rel. Conn v. Randolph*, 35 Ill.2d 24, 219 N.E.2d 337 (1966), which held that in a case wherein counsel were appointed to defend indigent prisoners charged with murder at trial 150 miles from their home county and were forced to expend personal funds for defense expenses and forego their law practices,

[4]Strasser, *Congress Doubles Fees for Lawyers*, Nat'l L.J., Oct. 22, 1984, at 3.

the statute which limited reimbursement to $500 for each defendant in a capital case could not be constitutionally applied. The court said counsel "are suffering an extreme, if not ruinous, loss of practice and income." *Id.* at 341.

However, the underlying basis for the Illinois decision was a determination by the state's highest court of a court's inherent power:

> At this time it is necessary to hold only that in the extraordinary circumstances presented in this case, the court's inherent power to appoint counsel also necessarily includes the power to enter an appropriate order ensuring that counsel do not suffer an intolerable sacrifice and burden and that the indigent defendant's right to counsel is protected.
>
> If such judicial power did not exist, the courts probably could not proceed, and certainly could not conclude the trial of indigent defendants in cases such as this. To permit the petitioners to withdraw after nine weeks of trial would be a prodigious waste of resources already spent, and would provide no assurance that a dilemma similar to the one existing now would not likewise result after the appointment of new counsel. We hold that upon the record presented here the petitioners are clearly entitled to payment of their costs and fees forthwith, as ordered by the trial court. A permanent solution to the problem presented is an appropriate subject for the legislature. The problem having now been exposed we trust that the General Assembly will respond. See *State v. Rush*, 46 N.J. 399, 217 A.2d 441.

Id. at 340. A discussion of other state cases ruling upon a court's inherent power, or lack of it, as the basis for an award of attorneys' fees to counsel representing indigents is found at 59 A.L.R.3d 569, 617.

In *Hall v. Cole*, 412 U.S. 1, 4-5, 93 S.Ct. 1943, 1945, 1946, 36 L.Ed.2d 702, 707 (1973), the United States Supreme Court said:

> Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166, 59 S.Ct. 777, 780, 83 L.Ed. 1184 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-392, 90 S.Ct. 616, 625, 24 L.Ed.2d 593 (1970); see *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967). (footnotes omitted)

See also Sierra Club v. Lynn, 502 F.2d 43, 65 (5th Cir. 1974), citing *Hall*, and the lengthy dissent by Associate Justice Hooper, in *County of Fresno v. Superior Court of Fresno County*, 82 Cal.App.3d 191, 198, 146 Cal.Rptr. 880, 884 (1978). *Randolph* was discussed in *Brown v. Board of County Commissioners of Washoe County*, 85 Nev. 149, 451 P.2d 708 (1969); then

in *Daines v. Markoff*, 92 Nev. 582, 555 P.2d 490 (1976), the court discussed both *Randolph* and its earlier decision, saying as to the latter:

> We also indicated that in extraordinary circumstances a court possessed the inherent power to award fees in excess of the statutory maximum. . . .

Id. at 493. The opposite view is voiced in *State v. Ruiz*, 269 Ark. 331, 602 S.W.2d 625 (1980).

III

If the answer to the second question is affirmative, should the trial court have awarded an attorney's fee above the statutory maximum for proceedings at the trial level, given the facts presented to it by trial counsel by his petition and testimony?

The statute expressly provides for the determination of the fee at the conclusion of the services, which occurred here. It is interesting to compare, however, the testimony in this case and that in *People v. Sanders*, 58 Ill.2d 196, 317 N.E.2d 552 (1974). Bearing in mind it was Illinois which initiated the "inherent power" notion in this area, that state's highest court held that "extraordinary circumstances" did not exist in *Sanders*. This was notwithstanding that both counsel had represented the indigent defendant for two years in defending him for the armed robbery and murder of a Chicago policeman; had conducted a three week trial; had successfully obtained a lengthy sentence rather than the death penalty; and had devoted 463 hours to

the preparation and trial of the case. The trial court awarded a fee of $250 and $50 for expenses. Both appellate courts affirmed. The Nevada decisions earlier cited herein also concluded "extraordinary circumstances" did not exist.

IV

If the answer to the second question is affirmative, should the trial court have awarded an attorney's fee above the statutory maximum for proceedings at the appellate level before the services were rendered and with the facts known to it at the time of the award?

We have located no authority for the premature award of an appellate fee in this state. *Randolph* was awarded prior to trial, however, not at the conclusion of representation.

LETTS, J., concurs.

ANSTEAD, C.J., dissents with opinion.

ANSTEAD, Chief Judge, dissenting.

This is a case in which the defendant's life was not only at risk, but in which the death penalty was actually imposed. I believe that it has been sufficiently demonstrated in the record below that the maximum amounts designated by statute for representation in this case for trial and appellate counsel are so unreasonably insufficient as to make it impossible for the trial court to appoint competent counsel for the indigent involved. Hence, I would approve the decision

of the trial court under the narrow facts presented for the same reasons I expressed in *Okeechobee County v. Jennings*, No. 83-1179 (Fla. 4th DCA Mar. 6, 1985), an opinion issued simultaneously herewith. The trial judge himself best expressed the dilemma he faced:

> That this court is confronted with conflicting laws, one of which requires competent counsel for a defendant who has been sentenced to death and the other stating that defense counsel can be paid only $2,000 for his services. The lowest bid for these services was $4,500, which is more than twice what the Legislature has allowed. One of these laws must yield to the other. There is no doubt in the court's mind that the Legislature, if confronted with the problem, would admit that the law requiring competent counsel was paramount and superior to the law allowing a mere $2,000 fee for the dreadful responsibility involved in trying to save a man from electrocution. Therefore this court finds that F.S. 925.036 in setting rigid maximum fees without regard to the circumstances in each case is arbitrary and capricious and violates the due process clause of the United States and Florida Constitutions. See *Aldana v. Holub*, 381 So.2d 231 (Fla. 1980). In simpler language, the Statute is impractical and won't work.

Surely something is wrong with a system that prevents a reasonable fee from being assessed in a capital case but authorizes the state to provide counsel for private landowners in eminent domain proceedings where the fees have been as high as $800,000. *State Dept. of Natural Resources v. Gables-By-The Sea, Inc.*, 374 So.2d 582 (Fla. 3d DCA 1979).

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR
MARTIN COUNTY,
STATE OF FLORIDA

CASE NO. 82-354-CF-A-01

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT
IN AND FOR
LAKE COUNTIES,
STATE OF FLORIDA

CASE NO. 82-912-CF-A-01

STATE OF FLORIDA,

Plaintiff

vs.

J. B. PARKER,

Defendant.

ORDER

THIS CAUSE having come before the court upon various motions and the court having before it ROBERT MAKEMSON, Trial Counsel for the Defendant, J. B. PARKER. MICHAEL OELNICK, County Attorney for Martin County, Florida; ROBERT G. UDELL, Esquire; JAMES MIDELIS, Assistant State Attorney for the Nineteenth Judicial Circuit; and HOWARD H. BABB,

JR., Public Defender for the Fifth Circuit; the court finds as follows, to-wit:

(1) That Robert Makemson did an excellent job as trial counsel for the Defendant, J. B. Parker, under exceptional circumstances and conditions, in a courthouse about one hundred and fifty miles away from his place of business.

(2) That subsequent to the trial, this court appointed the Public Defender of the Fifth Judicial Circuit to represent the Defendant, J. B. Parker in the Florida Supreme Court.

(3) That the Supreme Court of the State of Florida has entered its order forbidding and precluding the Office of the Public Defender of those counties within the jurisdiction of the Fifth District Court of Appeal from further representing indigent defendants in prosecuting their appeals from sentences of death to the Supreme Court of the State of Florida.

(4) That the Defendant, Mr. Parker, is entitled to the appointment of counsel as he is not permitted to represent himself on appeal from a sentence of death to the Supreme Court of the State of Florida.

(5) That it is the obligation of this court to appoint and find competent counsel for Mr. Parker. That this court, through the Court Administrator for the Nineteenth Judicial Circuit, circulated to all of the lawyers in the four counties of the Nineteenth Judicial Circuit, including St. Lucie, Martin, Indian River and Okeechobee Counties, a request for "bids" to any lawyer to undertake the representation of Mr. Parker as is evidenced by the bid

attached hereto, marked Exhibit "A" and by reference made a part hereof.

(6) That this court received three bids to represent Mr. Parker. One of the bids did not state a minimum fee as required and this court considered that a non-bid. A second bid received by this court was not in the form requested in the "Notice to Bid." The only other bid received by this court was the bid of Robert G. Udell, Esquire in the amount of $4,500.

(7) That Florida law requires the Supreme Court of Florida to hear appeals in cases involving the imposition of the sentence of death and since the Defendant cannot represent himself and argue his case before the Supreme Court, a lawyer must be provided at public expense.

(8) That the court further finds if no compensation or too low compensation be allowed, there will be no available attorney to represent the Defendant.

(9) That the low bid within this Circuit for the appellate representation was the sum of $4,500, which is $2,500 more than what the Florida Legislature has allowed. (See F.S. 925.036.) It is therefore

ORDERED AND ADJUDGED as follows, to-wit:

(1) That the Public Defender of the Fifth Judicial Circuit in and for Lake County, Florida, be and he is hereby relieved of the responsibility of representing the Defendant, J. B. Parker.

(2) That all post judgment pleadings having been completed in this case with this order and this court having previously ordered that the Clerk of the Circuit Court in and for Martin County, Florida retain all pleadings and evidence in this case and prepare and certify the record on appeal. This court hereby relieves the Clerk of Circuit Court in and for Lake County, Florida from any further responsibility in this matter.

(3) That this court is confronted with conflicting laws, one of which requires competent counsel for a defendant who has been sentenced to death and the other stating that defense counsel can be paid only $2,000 for his services. The lowest bid for these services was $4,500, which is more than twice what the Legislature has allowed. One of these laws must yield to the other. There is no doubt in the court's mind that the Legislature, if confronted with the problem, would admit that the law requiring competent counsel was paramount and superior to the law allowing a mere $2,000 fee for the dreadful responsibilty involved in trying to save a man from electrocution. Therefore this court finds that F.S. 925.036 in setting rigid maximum fees without regard to the circumstances in each case is arbitrary and capricious and violates the due process clause of the United States and Florida Constitutions. See *Aldana v. Holub*, 381 So.2d 231 (Fla. 1980). In simpler language, the Statute is impractical and won't work.

(4) This court further finds that the Statute is unconstitutional in that the Florida Supreme Court has inherent and constitutional jurisdiction of practice and procedure in all courts under Article 5, Section 2, Florida Constitution, and the Legislature's attempt to set

attorney's fees in court-appointed cases unconstitutionally encroaches upon that authority.

(5) Last, but not least, the court would like to point out that under the Separation of Powers doctrine, any interference by the Legislature or executive branch of government in the operation of the courts in carrying out their constitutionally mandated duties is unconstitutional.

THEREFORE, this court (having declared F.S. 925.036 (1981) unconstitutional) hereby orders Martin County to pay the court-appointed trial attorney, ROBERT MAKEMSON, the sum of NINE THOUSAND FIVE HUNDRED AND 00/100 ($9,500.00) DOLLARS for his representation of the Defendant at trial of which $3,500 shall be paid at this time. The balance of this fee, ($6,000.00) shall be placed in escrow pending the result of any appeal of this order by Martin County. This court further finds that the said court-appointed attorney has expended SIXTY-THREE and 34/100 ($63.34 DOLLARS for costs in representing the Defendant, and Martin County is hereby ordered to pay SIXTY-THREE and 34/100 ($63.34) DOLLARS to ROBERT MAKEMSON as reimbursement for his costs.

FURTHER, the court (having declared F.S. 925.036 (1981) unconstitutional) accepts Mr. Robert G. Udell's lowest bid of $4,500 and herey appoints him to represent Mr. J. B. Parker in said appeal to the Supreme Court of the State of Florida, and subsequent proceedings, and orders Martin County to set aside in an escrow account the sum of $4,500 pending the outcome of any appeal of this award by Martin County.

DONE AND ORDERED in Chambers, at Fort Pierce, St. Lucie County, Florida, this 4th day of May, 1983.

/s/ Philip G.Nourse

PHILIP G. NOURSE, CIRCUIT JUDGE

Copies furnished to:
Michael Oelnick, County Attorney for Martin County
Robert Makemson, Esquire
Robert G. Udell, Esquire
James Midelis, Assistant State Attorney
Howard H. Babb, Jr., Public Defender, 5th Circuit

ROBERT LEE DENNIS, et al., Petitioners, v. OKEECHOBEE COUNTY, Respondent. Supreme Court of Florida. Case No. 66,829. Opinion filed July 17, 1986. Application for Review of the Decision of the District Court of Appeal—Certified Great Public Importance. Robert Lee Dennis, in proper person, Okeechobee, Florida; John R. Cook, in proper person, Okeechobee, Florida; and J. Blayne Jennings, in proper person, Gifford, Florida, for Petitioners. Kyle S. VanLandingham, Okeechobee, Florida, for Respondent. Michael Zelman, Miami, Florida, for Florida Criminal Defense Attorneys Association and National Legal Aid and Defender Association, Amicus Curiae. Robert A. Ginsburg, Dade County Attorney, and Eric K. Gressman, Assistant County Attorney, Miami, Florida, for Metropolitan Dade County, Amicus Curiae.

(ADKINS, J.) We have for review *Okeechobee County v. Jennings*, 473 So.2d 1314 (Fla. 4th DCA 1985), in which the Fourth District quashed the trial court's finding of the unconstitutionality of the statutory fee limits imposed by section 925.036, Florida Statutes (1981) upon compensation for the representation of indigent criminal defendants. Citing as authority its opinion of *Martin County v. Makemson*, 464 So.2d 1281 (Fla. 4th DCA 1985), it re-certified to this Court the four questions presented in that case. We have jurisdiction. Art. V, §3(b)(4). Fla. Const.

We recently answered the certified questions in *Makemson v. Martin County*, No. 66,780 (Fla. July 17, 1986) [11 F.L.W. 337], and quashed the district court's decision, upholding the trial court's finding of the statute's unconstitutionality as applied to representation in extraordinary or unusual circumstances. We find that the trial court's findings as expressed in its order,

quoted in *Jennings*, 473 So.2d at 1315, amply established the need to grant fees in excess of the statutory guidelines in order to ensure adequate representation in the cause.

It is so ordered. (McDONALD, C.J., and BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., Concur.)

* * *

OKEECHOBEE COUNTY,
Florida, Appellant,

v.

J. Blayne JENNINGS, Robert Lee Dennis,
John R. Cook, Michael D. Gelety, Appellees.

No. 83-1179.

District Court of Appeal of Florida, Fourth District.

March 6, 1986.

Mandate Withheld April 4, 1985.

Appeal from the Circuit Court for Okeechobee County; Dwight L. Geiger, Judge.

Kyle S. Van Landingham, Okeechobee, for appellant.

Robert Lee Dennis, Okeechobee, pro se appellee.

J. Blayne Jennings, Grifford, pro se appellee.

John R. Cook, Okeechobee, pro se appellee.

No appearances for appellees Gelety, Kibbey, and Udell.

PER CURIAM.

We treat the appeal as a petition for certiorari, grant the writ and quash the order herein on the authority

of *Martin County v. Makemson*, 464 So.2d 1281 (Fla. 4th DCA 1985); and we certify to the Supreme Court of Florida the same question as we did in that case as being of great public importance.

LETTS and GLICKSTEIN, JJ., concur.

ANSTEAD, C.J., concurs specially with opinion.

ANSTEAD, Chief Judge, concurring specially.

This is an appeal from an order of the trial court holding that section 925.036, Florida Statutes (1981), which limits the fees payable to private attorneys specially appointed to represent indigents in criminal cases, is unconstitutional as applied to the facts of this case. I recognize that this decision is controlled by our opinion in *Makemson*. However, were I free to do so I would approve the trial court's action.

In the court below the lawyers who originally accepted appointment as special public defenders came to the court in the midst of the proceedings and asked that the statutory cap on fees be relaxed. In essence, the lawyers contended that because of the complexity of the cases and the necessity to devote inordinate amounts of time to prepare and try the cases, to continue with representation would result in financial ruination to them. They asserted that they were trapped between the choices of continuing and suffering the disastrous financial consequences or withdrawing and leaving the defendants without counsel. After taking evidence, including expert testimony that lawyers were not generally available in the area to take such complex cases for the

statutory fees allowed, the trial court entered an order voiding the statutory cap for the purpose of assessing fees in these cases. The court set out its reasons in a written order:

> This Court bases its decision upon the following findings:
>
> Cases of this type, that is trafficking controlled substance and conspiracy to trafficking controlled substance are characterized as some of the most complex criminal defense cases. This particular case has over one hundred and thirty state's witnesses listed to testify or may possibly testify. There are some four thousand pages of the State's evidence that may be introduced. There are eight defendants currently in the case. Most of the witnesses should be deposed by each defense counsel or at least interviewed by them. The case involves the use of interception of oral communication by use of body bugs, informers, some investigation by Federal, both Federal and State agencies. The defense of entrapment has been asserted. Currently it is estimated that over six weeks at approximately four days a week and four hours per day will be required to select a jury in the case. To this point, there have been four weeks of evening motion sessions at three hours per day, two to three times a week. (As of February 25, 1983). It is estimated that the trial will take between four to eight weeks, once the evidence starts. That would be approximately four days a week six hours in court time per day. Discovery and pre-trial time has taken between forty and one hundred sixty five hours per lawyer. As per defense lawyer. It is extremely unlikely

that any competent lawyer would accept representing a defendant in this case as special public defender for a fee of twenty five hundred dollars or less. If a lawyer knows that the fee in the case would be limited to twenty five hundred dollars or less, and that lawyer is not independently wealthy, that competent counsel could not be found who would accept representation as special public defender in this case either from the outset of the case or from jury selection forward. A reasonable expected fee in this case, for a private lawyer, would be an amount between thirty and forty thousand dollars, exclusive of out of court costs or out of pocket costs.

In *Metropolitan Dade County v. Bridges*, 402 So.2d 411 (Fla. 1981), the facial validity of section 925.036 was upheld by a plurality opinion in which three justices rejected attacks of unconstitutionality predicated on due process, equal protection and right to counsel concerns.[1] The *Bridges* plurality opinion stated:

> We further hold that Ross has failed to demonstrate that an indigent defendant's right to counsel has been impinged upon in any way by this statute. Indigent defendants are not denied counsel by section 925.036. At common law, it was the professional obligation of the lawyer to accept an assignment to represent an indigent party when directed to do so by the court, but there was no right to compensation from the government or any other source for representation of the poor. *In the*

[1]This court has, of course, followed *Bridges* and limited fees to the statutory maximums. *Broward County v. Wright*, 420 So.2d 401 (Fla. 4th DCA 1982); *Soven v. Palm Beach County*, 422 So.2d 91 (Fla. 4th DCA 1982).

Interest of D.B., 385 So.2d 83 (Fla. 1980). Since *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), which established a fundamental constitutional right to counsel in various classes of cases, questions have arisen as to whether lawyers should be relieved of their historical duty to represent the poor. Questions have even arisen as to whether requiring a member of the Bar to represent an indigent with no compensation or minimum compensation amounts to a taking of property without due process of law. We have held that lawyers should not be completely relieved of their responsibility to represent the poor although we have recognized the concomitant obligation of the government to provide legal representation when such is constitutionally required, and we have held that requiring a lawyer to perform his historical professional responsibility to represent the poor does not constitute an unfair "taking" of private property in violation of due process. *In the Interest of D.B.*

Unless it is demonstrated that the maximum amounts designated for representation in criminal cases by section 925.036 are so unreasonably insufficient as to make it impossible for the courts to appoint competent counsel to represent indigent defendants, we cannot say that section 925.036 violates the sixth amendment right to counsel. In the present case, the defendant represented by Ross was not denied his sixth amendment right to representation by section 925.036, nor is it contended that he was denied such right.

402 So.2d at 414-15. A fourth justice concurred in the result but reserved the right to reconsider the right to counsel issue "should it be demonstrated that the monetary limitations placed by the legislature on the compensation paid to court appointed attorneys representing indigent criminal defendants be so unreasonable as to make it impossible to secure effective counsel to those individuals." *Id.* at 415 (Sundberg, Chief Justice, concurring specially). Three justices dissented and would have approved a result permitting the assessment of fees above the statutory limits in cases involving such extraordinary circumstances that the amount of time required to be spent by the appointed lawyer on the case would render the fee allowed under the statute a meaningless token.[2]

There is a division of authority in other jurisdictions as to the validity of similar statutory limitations on fees. Some states, under circumstances similar to those involved herein, have struck down statutory caps on attorneys' fees. In *People ex rel Conn v. Randolph*, 35 Ill.2d 24, 219 N.E.2d 337 (1966), the court held that fee limits could be unconstitutional in extraordinary circumstances. In such cases, the courts have the inherent power to abrogate such limits. "[T]he statute cannot constitutionally be applied where it appears, as here, that appointed counsel cannot continue to serve because they are suffering an extreme, if not ruinous, loss of practice and income and must expend large out-of-pocket sums in the course of trial." *Id.* at 341.

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[2]Two of the justices, Sundberg and England, who concurred in the majority decision in *Bridges* are no longer on the Supreme Court.

Randolph was adopted in *Bias v. State*, 568 P.2d 1269 (Okla. 1977); *Daines v. Markoff*, 92 Nev. 582, 555 P.2d 490 (1976); and *Application of Armani*, 83 Misc.2d 252, 371 N.Y.S.2d 563 (1975).

In Smith v. State, 118 N.H. 764, 394 A.2d 834 (1978), the New Hampshire Supreme Court held that the Legislature violated the separation of powers doctrine by establishing a fee limit because the determination of fees is solely a judicial responsibility.

> The obligations and responsibilities of the bar are matters of judicial concern alone. See *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 248, 77 S.Ct. 752 [761], 1 L.Ed.2d 796 (1957) (Frankfurter, J., concurring); N.H. Judicial Council 5th Report 20-21 (1954); *State v. Rush*, 46 N.J. 399, 411, 217 A.2d 441, 447 (1966); *In re Lacey*, 11 Cal.2d 699, 701, 81 P.2d 935, 936 (1938). Since the obligation to represent indigent defendants is an an obligation springing from judicial authority, so too is the determination of reasonable compensation for court-appointed attorneys a matter for judicial determination. The power to regulate officers of the court is a power inherent in the judicial branch. Implicit in that power is the authority to fix reasonable compensation rates for court-appointed attorneys.

Id. at 838-39. Subsequently, in *State v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (1983), the court amended a supreme court rule, formulated in response to *Smith*, to include an exception for unusual circumstances. The Federal statute also provides for an abrogation of fee limits for extraordinary circumstances. 18 U.S.C. § 3006

A(d)(3). Georgia provides for such a waiver in these circumstances by statute and court rule. *Dickens v. State*, 147 Ga.App. 25, 248 S.E.2d 36 (1978). Massachusetts and Montana have similar court rules. *Edgerly v. Commonwealth*, 379 Mass. 183, 396 N.E.2d 453 (1979); *State v. Allies*, 182 Mont. 323, 597 P.2d 64 (1979). Michigan, Iowa, and South Dakota statutes allow the trial judge to award a reasonable fee without limit. *Matter of Burgess*, 69 Mich. App. 689, 245 N.W.2d 348 (1976); *Hulse v. Wifvat*, 306 N.W.2d 707 (Iowa 1981); *Johnson v. City Commission of the City of Aberdeen*, 272 N.W.2d 97 (S.D. 1978).

In states that have no statute or court rule, the traditional rule has been that attorneys must represent indigent criminal defendants without compensation. *Sparks v. Parker*, 368 So.2d 528 (Ala. 1979). In *State v. Ruiz*, 269 Ark. 331, 602 S.W.2d 625 (1980), the court held that a $350 statutory maximum fee for appointed counsel was constitutional because each attorney had a duty to provide his services without compensation. This result was reached by similar reasoning in *Keene v. Jackson County*, 3 Or.App. 551, 474 P.2d 777 (1970). Some state courts however, have refused to follow this rule. *See State ex rel. Partain v. Oakley*, 159 W.Va. 805, 227 S.E.2d 314 (1976); and *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966). Thus it appears that the states are in disagreement on whether attorneys need be paid at all for their representation of indigent defendants, and, if so, whether a fee limit may be abrogated under any circumstances.

I believe that it has been sufficiently demonstrated in the record below that the maximum amounts designated by statute for representation in these cases

are so unreasonably insufficient as to make it impossible for the trial court to appoint competent counsel for the indigents involved. *See Bridges*. Hence, I believe this case meets the criteria for the exception set out in *Bridges* for avoiding the statutory cap and I would approve the decision of the trial court under the narrow facts presented. While I am in complete concurrence with the supreme court's observations in *Bridges* as to the obligation of lawyers to represent the indigent, I am also cognizant of the great variations in complexity, and attendant time demands, involved in criminal cases to which lawyers may be assigned. In my view the present statute's failure to recognize these distinctions and to deal with them in a realistic and reasonable manner, as exemplified in the case at hand, constitutes a major flaw in the overall scheme.

The stakes, of course, in the form of fines, imprisonment, and, in some cases even death, are at their highest in criminal proceedings and the lawyer's responsibility correspondingly greater. Under our adversary system of justice the role of the defendant's advocate is critical in assuring a just result in each case to the maximum extent possible under the law. Under the adversary system, with the exception of certain fundamental responsibilities placed on the prosecutor

and the court, we rely on the defendant, acting through his counsel, to discover and present all relevant defensive and mitigating circumstances to the adjudicators.[3]

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[3]That we are no less committed to providing an indigent defendant these fundamental safeguards was recently, and forcefully, reaffirmed by the United States Supreme Court in a decision upholding an indigent defendant's right to the services of a state-provided psychiatrist where insanity is in issue:

> This Court has long recognized that when a state brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the 14th Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.
>
> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the state proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087, 84 L.Ed.2d 53, opinion issued February 26, 1985.

The rights of the lawyer, too, must be figured in the equation at some point. It would be unrealistic not to recognize that there must be limits to the amount of time a lawyer can be forced to devote to a case with little or no compensation. This creates a problem that is almost impossible to detect because of the variety of ways a lawyer may defend a case. In most cases lawyers do not serve involuntarily but rather volunteer either by consenting to an "appointment" in a particular case or by making it known that they will accept appointments in certain types of cases if offered. We have not yet faced the situation in Florida where the lawyer is forced to serve over his objection and the client is thus faced with being represented by a lawyer who doesn't want to serve him. It is also important to keep in mind that there is an entitlement to competent counsel, not just anyone on the bar rolls. In the legal profession, as in all others, the "more" competent a lawyer is the greater the remuneration he usually receives for his services.

Unlike medicine or engineering or plumbing, the art or science of lawyering relies a great deal more on individual personality and motivation for success. A lawyer who "doesn't have his heart in it" can lose a jury trial in a hurry. In most instances, a lawyer's professional ethics and personal concern for justice may motivate him to devote whatever time and effort is necessary in the individual case. Indeed, that is what keeps the present system afloat. But it would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he will be reasonably

compensated. The indigent client, of course, will be the one to suffer the consequences if the balancing job is not tilted in his favor. In this case the trial court has concluded that just such a dilemma existed and it acted to relieve the dilemma by allowing a greater fee.

Government provided public defenders, of course, ordinarily represent indigents. The problem arises, only when, as here, conflicts between codefendants require other counsel to be appointed. One solution to this problem would be to appoint public defenders from neighboring circuits, as opposed to private lawyers, and have those public defenders serve on special assignment for the time necessary. This is already the practice when local prosecutors are unable to act in a particular case because of conflict or other reasons, and another prosecutor, usually one from another circuit, is appointed. Of course, budgetary limitations and travel expense may limit the efficacy of this solution. Another possible solution may be to base the statutory fees on an hourly rate rather than a cap for the total fee. Such a scheme could keep the hourly rate modest but permit lawyers to receive a fee based on the necessarily varying amounts of time needed to defend cases of varying degrees of difficulty; the major flaw not covered under the present scheme.

I recognize that there are no easy answers. But I think we can do better, and certainly should try.

BY ORDER OF THE COURT:

ORDERED that the Motion filed March 13, 1985 by Appellee, Richard Lee Dennis, to withhold the issuance of the Mandate pending Supreme Court review is granted,

conditioned upon said appellee, or any other party, initiating proceedings in the Supreme Court of Florida.

ORDERED that the March 18, 1985 Stipulated Motion to remove Richard D. Kibbey, Esquire, as a party apellee to these proceedings is granted.

ORDERED that the March 28, 1985 Motion to remove Robert G. Udell, Esquire, as a party appellee to these proceedings is hereby granted.

[FILED 1983 MAY 9]

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR
OKEECHOBEE COUNTY, FLORIDA.

CASE NO. 82-196-CF

STATE OF FLORIDA,

Plaintiff,

-vs-

V.L. UNDERHILL, JOHN CLYDE SPEARS, GUSS ROSS, JR., EDWARD ALBERT WOMBLE, JEAN PIERRE CHASSAGNE, DOYLE DEWAINE HAZELLIEF, ROY JEFFREY UNDERHILL, JODY CLINTON UNDERHILL, LOWRY WARNER DAVIS, ALAN BAKER PARROTT, GLENN GARY CARDEN JAMES LAMAR MIDDLETON,

Defendants.

ORDER

THIS CAUSE came on to be heard upon motion of the court appointed special public defenders in this case regarding the applicability of Florida Statutes 925.036; upon argument of court appointed counsel, the county attorney of Okeechobee County, Florida, and the State Attorney; and the Court being fully advised in the premises, it is

ORDERED AND ADJUDGED that Florida Statute 925.036 which provides a $2500.00 fee limitation for appointed counsel in non capital, nonlife felonies is unconstitutional as applied to this particular case. This case is ripe for a decision at this time.

This Court bases its decision upon the following findings:

Cases of this type, that is trafficking controlled substance and conspiracy to trafficking controlled substance are characterized as some of the most complex criminal defense cases. This particular case has over one hundred and thirty state's witnesses listed to testify or may possibly testify. There are some four thousand pages of the State's evidence that may be introduced. There are eight defendants currently in the case. Most of the witnesses should be deposed by each defense counsel or at least interviewed by them. The case involves the use of interception of oral communication by use of body bugs, informers, some investigation by Federal, both Federal and State agencies. The defense of entrapment has been asserted. Currently it is estimated that over six weeks at approximately four days a week and four hours per day will be required to select a jury in the case. To this point, there have been four weeks of evening motion sessions at three hours per day, two or three times a week. (As of February 25, 1983). It is estimated that the trial will take between four to eight weeks, once the evidence starts. That would be approximately four days a week six hours in court time per day. Discovery and pre-trial time has taken between forty and one hundred sixty five hours per lawyer. As per defense lawyer. It is extremely unlikely that any competent lawyer would accept representing a defendant

in this case as special public defender for a fee of twenty five hundred dollars or less. If a lawyer knows that the fee in the case would be limited to twenty five hundred dollars or less, and that lawyer is not independently wealthy, that competent counsel could not be found who would accept representation as special public defender in this case either from the outset of the case or from jury selection foward. A reasonable expected fee in this case, for a private lawyer, would be an amount between thirty and forty thousand dollars, exclusive of out of court costs or out of pocket costs.

DONE AND ORDERED in chambers in Okeechobee, Florida, this 9th day of May, 1983. (Bench ruling—February 25, 1983).

/s/ [illegible]
CIRCUIT JUDGE

Copies furnished to:

All Counsel and
Kyle S. Van Landingham, County Attorney

CIRCUIT COURT MINUTE BOOK 46 PAGE 07

ORDER RE: ATTORNEY FEES FEBRUARY 25, 1983

BY THE JUDGE:

To supplement the record as far as finding of fact, to those read into the record February 21, 1983, I find the following additional facts: that cases of that type, that is trafficking controlled substance and conspiracy to trafficking controlled substance are characterized to some of the most complex criminal defense cases. This particular case has over one hundred and thirty state's witnesses listed to testify or may possibly testify. There are some four thousand pages of the State's evidence that may be introduced. There are eight defendants currently in the case. Most of the witnesses should be deposed by each defense counsel or at least interviewed by them. The case involves the use of interception of oral communication by use of body bugs, informers, some investigation by Federal, both Federal and State agencies. And a defense asserted by a certain defendants of entrapment. Currently it is estimated that over six weeks at approximately four days a week and four days per day will be required to select a jury in the case. To this point, there have been four weeks of evening motion sessions at three hours per day, two to three times a week. It is estimated that the trial will take between four and eight weeks, once the evidence starts that would be approximately four days a week, six hours in court time per day. Discovery and pre-trial time has taken between forty and one hundred sixty five hours per lawyer. As per defense lawyer. It is extremely unlikely that any competant lawyer would accept representing a defendant in this case as special public defender for a

fee of twenty five hundred dollars or less. I do find that if a lawyer knows that the fee in the case would be limited to twenty five hundred dollars or less, and that lawyer is not independently wealthy that competant counsel could not be found who would accept representation as special public defender in this case. That either from the outset of the case or from jury selection forward. A reasonable expected fee in this case, for a private lawyer, would be an amount between thirty and forty thousand dollars. Thirty thousand dollars and forty thousand dollars exclusive of out of court costs. Or out of pocket costs. Based on these findings and going back and reviewing the conclusions of law, first concerning whether the court is limited to a fee of twenty five hundred dollars per defendant. On Monday, I did find specifically as a matter of law, that the court is limited to a fee of twenty five hundred dollars per defendant unless the application of that twenty five hundred dollar limit which is set forth in Florida Statute 925.036 is unconstitutional as applied in a given case. Secondly, concerning whether this particular case is right for a decision as to whether there should be an awarded excess of that maximum, I do find, as I did on Monday, because of the nature of the case and the actual amount of time that the case has taken to this point, that the decision is right at this time, that the case of right for decision at this time as an interim measure. Third, then concerning whether the application of Florida Statute 925.036, as limiting a fee, in a case of this type to twenty five hundred dollars is unconstitutional as applied to this particular case. That is, is avowed of the sixth and fourteenth amendments of the Constitution of the United States. I do find based upon the additional findings of fact made today, that the application then is unconstitutional as applied to the defendants in this

particular case. Who have been, or who are being represented by special public defenders and I do find then under the existing law as set forth in Broward County vs Wright and in Rose vs Palm Beach County, that this is the type of case which has demonstrated an extreme case such as to mandate the exceeding of the statutory limit for special public defender fees for indigent or partially indigent defendants therefore, the motion to exceed the statutory limit is granted as to the each of the defendants who is receiving the services of public defender or special public defender in this case, at this time.

Now is there any question concerning the ruling or is the ruling not complete in any fashion?

STATE OF FLORIDA
OKEECHOBEE COUNTY
THIS IT TO CERTIFY THAT
THIS IS A TRUE AND
CORRECT COPY OF THE
ORIGINAL.
GLORIA J. FORD, CLERK
BY P Dasher D.C.
DATE 10/9/86

[FILED 1983 JUN 17]

STATE OF FLORIDA
OKEECHOBEE COUNTY
THIS IS TO CERTIFY THAT THIS IS A TRUE
AND CORRECT COPY OF THE ORIGINAL
BY CLIF BETTS, JR. CLERK
BY SUE CLARK D.C.
DATE 10/20/83

IN THE CIRCUIT COURT OF THE NINETEENTH
JUDICIAL CIRCUIT IN AND FOR
OKEECHOBEE COUNTY, FLORIDA

CASE NO. 82-196-CF

STATE OF FLORIDA,

Plaintiff

-vs-

V.L. UNDERHILL, JOHN CLYDE SPEARS, GUSS ROSS, JR., EDWARD ALBERT WOMBLE, JEAN PIERRE CHASSAGNE, DOYLE DEWAINE HAZELLIEF, ROY JEFFREY UNDERHILL, JODY CLINTON UNDERHILL, LOWRY WARNER DAVIS, ALAN BAKER PARROTT, GLENN GARY CARDEN, JAMES LAMAR MIDDLETON,

Defendants

AMENDED ORDER

THIS CAUSE came on to be heard on February 25, 1983, upon motion of the court appointed special public defenders in this case regarding the applicability of Florida Statutes 925.036; upon argument of court

appointed counsel, the county attorney of Okeechobee County, Florida, and the State Attorney; and the court being fully advised in the premises, it is

ORDERED AND ADJUDGED

1. This case is ripe for a decision at this time.

2. The court finds as facts upon which to base its decision:

a. The defendants for whom counsel have been appointed in this case have been charged with trafficking in controlled substance and conspiracy to trafficking controlled substance. Preparation for and trial of cases of this type are generally characterized as some of the most complex criminal defense cases. In this particular case the state may call as witnesses over one hundred and thirty persons. The state has disclosed some four thousand pages of evidence that may be introduced. Currently eight defendants are charged and are being tried together. Counsel for defendants opine that most of the witnesses should be deposed or at least interviewed by each counsel. The evidence already heard by this court as of February 25, 1983, indicates interception of oral communication by use of body bugs, informers, and investigation by both Federal and State agencies. Defendants have asserted the defense of entrapment.

b. As of February 25, 1983, it is estimated by counsel for state and defendants that over six weeks, at approximately four days a week and six in-court hours per day will be required to select a jury in the case. As of February 25, 1983, there have been approximately thirty-six hours of evening sessions held in this case for the purpose of the court hearing evidentiary motions.

Counsel estimate that the trial will take between four to eight weeks, once the jury is selected. The court anticipates spending six hours per day, four days each week, in the trial. Defense counsel have spent between forty and one hundred sixty-five hours each in discovery and pre-trial out-of-court preparation.

c. It is extremely unlikely that any competent lawyer would accept representing a defendant in this case as special public defender for a fee of twenty five hundred dollars or less.

d. A defense counsel's fee which would be reasonably expected in this case for privately obtained counsel would be an amount between thirty and forty thousand dollars, exclusive of out-of-pocket costs.

3. Based upon these facts the court concludes as a matter of law that Section 925.036, Florida Statutes (1981) which provides a twenty-five hundred dollar fee limitation for appointed counsel in non-capital, non-life felony cases is unconstitutional as applied to this particular case.

DONE AND ORDERED this 15th day of June 1983 in chambers, nunc pro tunc.

/s/ Dwight L. Geiger
DWIGHT L. GEIGER
Circuit Judge

cf: Counsel of Record
Kyle S. Van Landingham, Esq., County Attorney